

¹ Although the first page of this transcript reflects it is a transcript of a motion and penalties hearing, at page 4 of the transcript ALJ Avery states, "We are here for purposes of Preliminary Hearing" and "This is basically a follow-up on the previous Preliminary Hearing Transcript hearing held on January 17, 2013."

Respondent alleges the work incidents were not the prevailing factor causing claimant's back injury and current need for medical treatment.

ALJ Avery determined claimant sustained a back injury by accident arising out of and in the course of his employment with respondent and that claimant's accidents were the prevailing factor causing his injury and current need for medical treatment.

The issue on review is: Did claimant's back injury, allegedly sustained as the result of May 2 and 22, 2012, accidents, arise out of and in the course of his employment with respondent? Specifically, were claimant's alleged accidents the prevailing factor causing his back injury and current need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Prior to May 2012, claimant had a history of back issues. Claimant testified his low back symptoms began in early 2000. In 2002 or 2003, while working for Pyramid Construction, claimant sustained a low back injury. In March 2005, claimant sustained another low back injury while working for Pyramid. Claimant testified that either after the 2002/2003 or 2005 back injury, Dr. Lance Snyder performed surgery on claimant's low back. It appears claimant settled the claims for \$80,000 in September 2005 and \$84,900 in July 2011. According to claimant, after recovering from the 2005 low back injury, he was symptom-free, except for occasional flare-ups, until the May 2012 accidents. Claimant acknowledged reporting approximately 20 work-related accidents in his lifetime in addition to the two May 2012 accidents. He did not recall a 1979 work-related lifting accident or a 1985 work-related fall.

In November 2011, claimant fell off a ladder at home and had to be life-flighted to KU Medical Center. He was off work five to six weeks. Claimant testified he broke his ribs in the fall.

Claimant testified that on May 2, 2012, he was switching trailers when his hand slipped off the handrail so he jumped backwards and turned. When claimant landed, he twisted his back and felt immediate pain in his low back and hips that radiated into the back of his left thigh. He testified that this was the first time he had symptoms in his left leg, as his 2002/2003 accident produced symptoms in his right leg. Claimant indicated that respondent offered to provide medical treatment after the May 2 accident, but claimant decided to wait to see if he got better. Three days later claimant asked respondent to see a doctor, but respondent refused. Claimant could not afford medical treatment and instead saw Dr. Jeremy D. Rodrock, a chiropractor, three or four times.

From May 3 through May 17, 2012, claimant received chiropractic treatment from Dr. Rodrock on five occasions. Dr. Rodrock indicated that at each appointment, claimant presented with complaints of left sacroiliac and left posterior leg discomfort. Dr. Rodrock's May 3 notes indicated claimant had a gradual onset of pain that was noticed two weeks earlier. However, in a letter dated November 19, 2012, Dr. Rodrock indicated he failed to put in his chart that claimant reported the pain began at work a day earlier.

Dr. Rodrock took x-rays which revealed diskogenic spondylosis at L1-5 and possible intervertebral foraminal narrowing at L4-5. Intervertebral disk thinning was observed by Dr. Rodrock at L1-5. The history taken by Dr. Rodrock indicated claimant had prior low back surgery. Dr. Rodrock provided claimant conservative chiropractic treatment.

On May 22, 2012, claimant was cranking a trailer and felt back pain so severe that he could hardly walk and could not finish his shift. Claimant requested medical treatment and was sent by respondent to Dr. Chris D. Fevurly, who gave claimant temporary restrictions. Dr. Fevurly recommended injections for claimant's back, but respondent never approved the injections. Claimant remained off work until October 2012, when he worked three days operating a forklift. Operating the forklift hurt claimant's back and he requested to see a physician, but respondent refused and told claimant he could see his own doctor and to go home or do whatever he wanted to do. Claimant went home and saw his personal physician, Dr. Kevin Hughes.

Claimant was seen at Dr. Fevurly's office three times, with the first visit on May 23, 2012, for complaints of low back and left leg pain. Claimant informed Dr. Fevurly of the May 2 and 22 accidents. Dr. Fevurly indicated claimant had a past history of low back issues in 2002 and 2003 while working for Pyramid. Dr. Fevurly had evaluated claimant in August 2003. Dr. Fevurly noted that a 2003 MRI showed multilevel degenerative disc disease with a disc herniation at L4-5 and a disc extrusion at L5-S1. Dr. Fevurly noted in his May 23, 2012, notes that claimant fell off a ladder at home six months earlier and sustained multiple rib fractures and a pneumothorax, but denied injuring his low back. Dr. Fevurly opined that the prevailing factor for claimant's low back condition was claimant's degenerative disc disease and the subsequent disc protrusions and disc herniations that have resulted from the underlying degenerative disc disease, which was a natural consequence of living and aging.

On May 30, 2012, claimant went to Family Medicine of Baldwin City for a DOT physical. Claimant's regular physician, Dr. Hughes, was not available, so claimant saw Dr. Jeffery L. Martin. Claimant complained of back pain. Because respondent would not provide medical treatment, claimant sought treatment from Drs. Martin and Hughes for his low back condition. On July 3, 2012, Dr. Martin indicated claimant had degenerative disc disease that claimant reported began at work.

The parties entered into an agreed order to have claimant evaluated by Dr. David J. Clymer, who saw claimant on September 19, 2012. Dr. Clymer indicated that claimant had

a prior work-related low back injury in 2002 that resulted in disc surgery and a 10% functional impairment and a 2005 work-related low back injury that resulted in a 14% functional impairment. However, since those injuries, claimant worked in a vigorous fashion. Dr. Clymer recommended a new MRI so it could be compared to claimant's past MRIs.

Dr. Clymer noted that an MRI study on March 24, 2005, revealed multilevel degenerative disc disease with mild chronic disc bulging at L3-4 and slightly more significant right-sided bulging at L4-5 and left-sided bulging at L5-S1. The October 16, 2012, MRI ordered by Dr. Clymer "reveals findings which are essentially identical to those noted in the past."² Dr. Clymer then gave specifics on how the 2005 and 2012 MRIs were nearly identical. He opined, "Consequently, I feel these findings are consistent with a rather mild gradual progression in the preexisting multilevel degenerative process without any clear evidence of a new localized injury."³ He then stated, "Consequently, I feel the primary and prevailing cause with regard to this issue is the preexisting problem and not specifically related to his more recent workplace events in May 2012."⁴

Dr. Hughes saw claimant on October 17, 2012. He reviewed the 2012 MRI report that showed claimant had L4-5 and L5-S1 disc disease, with disc dessication and slight bulges that could cause impingement to either leg.

Claimant, at the request of his attorney, was evaluated by Dr. Edward J. Prostic on December 11, 2012. Dr. Prostic took x-rays which showed degenerative scoliosis with stable retrolisthesis at L5-S1 and fairly severe degenerative disc disease at L4 to the sacrum and moderate at L3-4. He opined the work accidents on May 2 and 22, 2012, were the prevailing factor causing claimant's injury, medical condition and need for medical treatment. Dr. Prostic was aware of claimant's 2003 low back surgery, 2005 back injury and the results of the October 2012 MRI ordered by Dr. Clymer.

Following the January 17, 2013, preliminary hearing, ALJ Avery ordered that claimant be evaluated by Dr. Harold A. Hess and requested the doctor to, among other things, render an opinion as to whether the alleged accidents were the prevailing factor causing the low back injury and need for medical treatment. ALJ Avery also ordered that respondent pay claimant temporary total disability (TTD) benefits commencing January 17, 2013, until Dr. Hess' independent medical evaluation (IME) report was received.

Dr. Hess examined claimant on February 22, 2013, and reviewed MRIs from 2003, 2005 and 2012. He indicated the 2003 and 2005 MRIs showed L4-5 and L5-S1 disc

² P.H. Trans. (Jan. 17, 2013), Cl. Ex. 1.

³ *Id.*

⁴ *Id.*

degeneration. Dr. Hess indicated that because of the poor quality of the 2003 and 2005 MRIs, it was difficult to make a direct comparison to the 2012 MRI, but it appeared the foraminal disc herniation was larger at L5-S1 on the left on the 2012 MRI. He opined:

As this patient has been relatively pain-free in regards to his low back and the fact that he states that he never had left leg pain prior to the work-related injury of May 2012, it is my opinion, within a reasonable degree of medical certainty, that the May 2012 injury is a prevailing factor in this patient's current symptoms and condition.⁵

ALJ Avery determined:

Claimant was a credible witness. He testified to having prior back surgery, but had no significant symptoms until the accidental injury of May, 2012. Given the claimant's history since 2005 of being able to work at hard labor without medical treatment until his accidental injury or injuries of 2012, and given the fact both Dr. Hess (and initially Dr. Clymer) found a new injury as the result of the increase in size of the disc herniation and that claimant's accident was the prevailing factor, the Court finds claimant did suffer an accidental injury. Claimant's alleged accidental injury did arise out of and occur in the course of employment. The accidental injury was the prevailing factor causing claimant's injury, medical condition and current disability.⁶

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁸

K.S.A. 2011 Supp. 44-508 states in part:

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates,

⁵ Hess IME Report (Feb. 22, 2013) at 3.

⁶ ALJ Order for Compensation (March 26, 2013) at 3-4.

⁷ K.S.A. 2011 Supp. 44-501b(c).

⁸ K.S.A. 2011 Supp. 44-508(h).

accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Dr. Fevurly, who was employed by respondent, indicated that claimant's May 2012 accidents were not the prevailing factor causing his back injury and that claimant had a long history of low back pain with a previous impairment rating of category III lumbosacral DRE impairment. Claimant's expert, Dr. Prostic, opined claimant's accidents were the prevailing factor causing claimant's back injury, medical condition and need for medical treatment.

ALJ Avery found Dr. Clymer's report ambivalent and the ALJ ordered a new IME by Dr. Hess. In his October 17, 2012, report, Dr. Clymer stated: "Consequently, I feel the primary and prevailing cause with regard to this issue is the preexisting problem and not specifically related to his more recent workplace events in May 2012."⁹ The Board finds Dr. Clymer's prevailing factor opinion is straightforward and concise. A close examination of Dr. Hess' prevailing factor opinion reveals that he opined claimant's May 2012 accidents were **a** prevailing factor causing claimant's symptoms and condition, not **the** prevailing factor.

This Board Member finds claimant failed to prove that his accidents were the prevailing factor causing his back injury and current need for medical treatment. The medical evidence, specifically the opinions of Drs. Clymer and Fevurly, indicate claimant's progressive degenerative disc disease, not his accidents, was the prevailing factor causing his back injury and need for medical treatment. Therefore, ALJ Avery's March 26, 2013, Order awarding claimant TTD and medical benefits is vacated.

⁹ P.H. Trans. (Jan. 17, 2013), Cl. Ex. 1.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

WHEREFORE, the undersigned Board Member reverses the March 26, 2013, preliminary hearing Order for Compensation entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of July, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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 Brad E. Avery, Administrative Law Judge

¹⁰ K.S.A. 2012 Supp. 44-534a.

¹¹ K.S.A. 2012 Supp. 44-555c(k).